(2)

No. 02-1854

Supreme Court, U.S.
FILED
JUL 15 2003
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

MARIE G. KANESHIRO,
Surviving spouse of CALVIN T. KANESHIRO,

*Petitioner,*

v.

HOLMES & NARVER, INC. and
WAUSAU INSURANCE CO.,

*Respondents,*

and

DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

*Party-In-Interest.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## EMPLOYER/INSURANCE CARRIER RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT C. KESSNER
JAMES N. DUCA
*Counsel of Record*
Central Pacific Plaza,
19th Floor
220 South King Street
Honolulu, Hawaii 96813
Telephone No.
(808) 536-1900
Facsimile No.
(808) 529-7177

B. JAMES FINNEGAN
1990 Lombard Street,
Suite 300
San Francisco, California
94123
Telephone No.
(415) 931-9284
Facsimile No.
(415) 931-6247

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

## I. QUESTION PRESENTED

Whether there was substantial evidence in the record to support the factual finding of the administrative law judge in his order of October 5, 2000, that there was no mistake in the previous factual finding that the illness of claimant Calvin Kaneshiro was not causally related to his employment?

TABLE OF CONTENTS


| | | Page |
|---|---|---|
| I. | QUESTION PRESENTED | i |
| II. | STATEMENT OF THE CASE | 3 |
| III. | REASONS FOR DENYING THE PETITION | 6 |
| | A. THE QUESTIONS ARE ESSENTIALLY FACTUAL | 7 |
| | B. THE PETITION DOES NOT RELY UPON ANY UNSETTLED ISSUE OF FEDERAL LAW NOR ANY DISPARITY BETWEEN CIRCUIT COURTS OF APPEAL | 7 |
| | C. THE QUESTION PRESENTED DOES NOT HAVE A SIGNIFICANCE EXTENDING BEYOND THIS PETITIONER | 8 |
| | D. THE PETITIONER HAS RECEIVED A FULL AND FAIR OPPORTUNITY TO ARGUE HER ISSUES IN THE COURTS AND ADMINISTRATIVE TRIBUNALS BELOW | 9 |
| IV. | CONCLUSION | 10 |

# TABLE OF AUTHORITIES

Page

CASES

*McDonald v. Director, OWCP*, 897 F.2d 1510 (9th Cir. 1990) ..... 2

*O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) ..... 2

*Powers v. Sea Ray Boats, Inc.*, 31 B.R.B.S. 206 (1998) ..... 3

STATUTES

33 U.S.C. §901 et seq. ..... 3

33 U.S.C. §920(a) ..... 4

33 U.S.C. §921 ..... 2

33 U.S.C. §922 ..... 2, 5, 7

U.S. Sup. Ct. Rule 10 ..... 7

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This petition requests review of the question whether the decision on causation at the trial on remand was factually correct. The petition, however, misstates the question presented.

The question presented is accurately reflected in the decisions in the appellate courts below that are appendices attached to the petition for certiorari. On February 28, 2003, the Circuit Court of Appeals for the Ninth Circuit decided, by way of an unpublished memorandum opinion without oral argument, that there was no error in the affirmance by the Benefits Review Board of the denial of benefits to the claimant, Calvin Kaneshiro.

> The Benefits Review Board (BRB) affirmed the denial of benefits because the factual errors were harmless and because substantial evidence established that Kaneshiro's evidence was not related to his employment. . . .
>
> We agree with the BRB that the ALJ "rationally credited the medical opinions of record that conclude that defendant's CGL was not related to radiation exposure during the course of decedent's employment with employer." Appendix B at 2, 6.[1]

The excerpt quoted by the Ninth Circuit was from the Benefits Review Board's decision of September 28, 2001 (Appendix C), which held that:

> In adjudicating a claim, it is well-established that an administrative law judge is entitled to

[1] All references to appendices relate to the appendices attached to the Petition for Writ of Certiorari filed by Petitioner Marie G. Kaneshiro.

> determine the weight to be accorded the evidence of record, and is not bound to accept the opinion or theory of any particular medical examiner. . . .
>
> We therefore affirm the administrative law judge's determination on modification, based on the record as a whole that decedent's CGL was not related to his employment. *Id,* at 11-12.

The Petitioner mistakenly characterizes the issue as whether Administrative Law Judge DiNardi, who handled the 1996 trial on remand after the BRB's reversal of the original decision in favor of the Claimant, "failed to follow the Governing Case Law." This petition requests review by way of certiorari of the October 2000 ruling of the administrative law judge on a request for modification of an order disallowing a benefits claims (dated January 3, 1997, Appendix H). That request is based on 33 U.S.C. §922, which authorizes modifications "because of a mistake in a determination of fact." In such proceedings, errors of law cannot be the basis for a modification of the prior order denying benefits. Any errors of law in the denial of benefits can be corrected only through the process of direct appeal under 33 U.S.C. §921. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The direct appeal of the 1997 ruling was concluded by the May 1998 dismissal of the Claimant's untimely appeal to the Ninth Circuit Court of Appeals from Benefit Review Board's affirmance of the 1997 denial of benefits. The failure of the administrative law judge in the 1997 remand to give preclusive effect to "the Governing Case Law" or to consider himself bound by the factual findings made at the first trial, even if erroneous, were errors of law that could not be considered by the administrative law judge in connection with the request for modification or in appellate review of the decision on that request. *McDonald v.*

*Director, OWCP*, 897 F.2d 1510 (9th Cir. 1990); *Powers v. Sea Ray Boats, Inc.*, 31 B.R.B.S. 206 (1998).

## II. STATEMENT OF THE CASE

This is a Petition for Certiorari from an unpublished memorandum decision of the United States Circuit Court of Appeals for the Ninth Circuit on February 28, 2003. That decision affirmed the decision of the Benefits Review Board ("BRB"), which affirmed the denial of the Petitioner's request for modification of a previous administrative law judge's decision denying benefits under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§901 et seq., as extended by the Defense Base Act.

The request for modification was denied by order of the Administrative Law Judge on October 5, 2000. Appendix D.

The claim for compensation was filed by Calvin T. Kaneshiro on July 17, 1989. Mr. Kaneshiro alleged that he suffered from chronic granulocytic leukemia ("CGL"), allegedly caused by his employment with Holmes & Narver, Inc. ("the Employer"). Mr. Kaneshiro was exposed to ionizing radiation as a result of nuclear weapons testing in the Pacific Proving Grounds where Mr. Kaneshiro worked for the Employer from 1954 to 1956 as a waiter and cook. The Employer was a civilian contractor providing support personnel to the Atomic Energy Commission in a program being conducted by the United States of America. It was Mr. Kaneshiro's contention that his exposure to ionizing radiation while working for the Employer caused him to develop CGL, which was diagnosed in January of 1989.

An administrative law judge of the United States Department of Labor conducted a hearing on Mr. Kaneshiro's claim in May of 1992. By decision and order awarding benefits on March 11, 1993, the judge found that the presumption of causation under Section 20(a) of the LHWCA (33 U.S.C. §920(a)) applied, and that the evidence submitted by the Employer was insufficient to establish rebuttal of the presumption. The judge therefore found that Mr. Kaneshiro was entitled to temporary total disability compensation under Section 8(b) of the LHWCA.

The Employer appealed to the BRB. By decision dated March 18, 1996, the BRB vacated the judge's conclusion that the Employer failed to rebut the Section 20(a) presumption, and remanded the case to the administrative law judge for further proceedings to address all of the medical evidence, to re-evaluate whether the Section 20(a) presumption had been rebutted and, if it was, to render a decision consistent with the evidence as a whole.

On remand, the case was assigned to another administrative law judge because the original judge was no longer in the employ of the Office of Administrative Law Judges. The court found that the Employer had rebutted the statutory presumption of causation. After considering both the evidentiary record developed at the 1992 hearing and additional briefs submitted by the parties on remand, the administrative law judge issued a decision and order on remand denying benefits, dated January 3, 1997. In denying Mr. Kaneshiro's claim, the judge concluded that the evidence from the Employer's experts and the soundness of their scientific reasoning supported the Employer's position on both the calculation of the amount of radiation to which Mr. Kaneshiro was exposed the causation of his illness.

Mr. Kaneshiro appealed the decision on remand to the BRB. The BRB issued its decision on November 17, 1997, affirming the administrative law judge's decision denying benefits. In his appeal, Mr. Kaneshiro argued that the expert opinions credited by the judge were insufficient to establish rebuttal of the statutory presumption of causation, but the BRB considered and rejected this argument. The decision of the BRB noted that the administrative law judge discussed "the pre-eminent qualifications and international stature of employer's witnesses and determined that the scientific data presented by each of the employer's experts was persuasive and credible." Appendix G at 9. It also affirmed the judge's finding that the Section 20(a) presumption had been rebutted by the testimony of several of the experts presented by the Employer.

Mr. Kaneshiro then appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit. However, the appeal was untimely and was dismissed on the motion of the Employer. That court also denied a petition for reconsideration of the dismissal on July 1, 1998.

Mr. Kaneshiro's illness resulted in his demise in June of 1997. His widow filed a request for modification of the decision on remand that denied benefits, pursuant to Section 22 of the LHWCA, 33 U.S.C. §922. A formal hearing was held on the request for modification on November 16, 1999, and the Petitioner and the Employer presented additional testimony, arguments and briefs. By decision dated October 5, 2000, the administrative law judge found no mistake in the previous determination that the decedent's CGL was not caused by his work related exposure to ionizing radiation, and concluded that the Employer's evidence with respect to the extent of the

decedent's radiation exposure was more credible than that of the claimant.

The Petitioner then appealed the denial of the request for modification to the BRB, which affirmed that denial by unpublished decision dated September 28, 2001. In its decision, the BRB relied upon the well-established legal rule that an administrative law judge is entitled to determine the weight to be accorded to the evidence of record and found that the judge rationally credited the medical opinions of record that supported the Employer's position on the cause of decedent's CGL.

The Petitioner appealed from the BRB decision to the Ninth Circuit Court of Appeals, which affirmed on February 28, 2003. In an unpublished memorandum opinion entered without oral argument, the Ninth Circuit agreed with the BRB that the ALJ had rationally credited the medical opinions of the experts called by the Employer with respect to dosage and causation issues. Petitioner's petition for rehearing to that court was denied.

The Petitioner then filed this Petition for a Writ of Certiorari.

## III. REASONS FOR DENYING THE PETITION

The petition should be denied because the questions presented, even as framed by the Petitioner, do not involve issues of national importance and general application.

### A. THE QUESTIONS ARE ESSENTIALLY FACTUAL

The issue at the modification hearing was whether the previous denial of benefits was based on a mistake of fact concerning the absence of a causal connection between decedent's leukemia and his employment related radiation exposure. Indeed, as noted above, any attempt by the Petitioner to rely upon mistakes of law as a basis for modification of the order denying benefits would have been inconsistent with the express language of 33 U.S.C. §922, which authorizes modification only for "a change in conditions or because of a mistake of fact." The factual question turned on whose exposure and causation witnesses were more believable, the decedent's or the Employer's. The issues were entirely factual, and the trial judge found (and the BRB affirmed, in its 1997 decision) that the Employer's evidence overcame the presumption of causation operating in favor of the decedent. Appellate courts routinely approach the review of the factual conclusions of trial courts under a deferential standard. This petition falls squarely within the Court's admonition that "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." *U.S. Sup. Ct. Rule* 10.

### B. THE PETITION DOES NOT RELY UPON ANY UNSETTLED ISSUE OF FEDERAL LAW NOR ANY DISPARITY BETWEEN CIRCUIT COURTS OF APPEAL

The petition does not call upon the Court to discharge its function of resolving and providing uniformity on issues of federal law. The alleged error asserted by the

Petitioner does not require the Court to clarify an ambiguity in a federal statute or the United States Constitution. The petition does not rely upon a disagreement among the Circuit Courts of Appeal concerning the proper legal rule to apply. The petition seeks the review of an unpublished memorandum decision of the Ninth Circuit Court of Appeals having no precedential value. To the extent that it involves issues of law (it does not), that decision does not establish controlling principles even for the courts in that circuit. Consequently, there is little need for review of the case by this Court.

### C. THE QUESTION PRESENTED DOES NOT HAVE A SIGNIFICANCE EXTENDING BEYOND THIS PETITIONER

Because the ruling below was highly fact-specific, arose in an uncommon factual context, did not establish any rule of law affecting other cases and did not address an important issue of federal decisional, statutory or constitutional law, the questions presented by this petition lack any significance extending beyond this Petitioner. Granting the petition will divert the Court's attention from recurring matters of national importance that comprise the most effective use of the Court's limited resources.

A ruling by this Court will apply only to a few people and have little real-world importance. The tests at the Pacific Proving Grounds occurred between 1954 and 1956, nearly fifty years ago. Over the ensuing decades, it is reasonable to assume that substantially all claims of employment-related illnesses that would be made from those events have been made and adjudicated. The factual context in which the issues arise, i.e., above-ground

nuclear weapons tests, have not been repeated in decades, and changes over the decades in testing technology, radiation measuring technology and the political climate mean that they are not likely to recur in the foreseeable future, if ever. Each worker's experience would involve different employment and recreational activities and different degrees of exposure to radiation from the weapons test. A finding that one person's illness either did nor did not result from his employment would have little bearing on the same question for another worker. The facts of this case are therefore unusual and unique, and the Court's resources are better employed on the review of issues having wider application.

### D. THE PETITIONER HAS RECEIVED A FULL AND FAIR OPPORTUNITY TO ARGUE HER ISSUES IN THE COURTS AND ADMINISTRATIVE TRIBUNALS BELOW

As explained in the Statement of the Case, this benefits claim has been the subject of rulings by three trial-level administrative law judges, three appeals to the Benefits Review Board, two appeals to the Ninth Circuit Court of Appeals (one of which was dismissed for untimeliness), and one petition for rehearing by the Ninth Circuit Court of Appeals. The Petitioner and her predecessor-in-interest, Mr. Kaneshiro, have received a full and fair opportunity to present their various factual and legal arguments over the fourteen years since the claim was first filed. Although it is understandable that the Petitioner is unhappy with the facts found in those proceedings, her argument for certiorari amounts to little more than the claim that the trial courts reached the wrong conclusion on the facts, and ignores the well-established

rule that the finder of fact is entitled to choose between the conflicting views of expert witnesses. The Petitioner has received every opportunity to be heard on the facts since the claim was filed in 1989. The facts have been examined in meticulous detail on three occasions and the case should now come to an end.

## IV. CONCLUSION

For these reasons the petition should be denied.

DATED: Honolulu, Hawaii, July 15, 2003.

Respectfully submitted,

ROBERT C. KESSNER
JAMES N. DUCA
B. JAMES FINNEGAN

*Attorneys for Employer-Insurance Carrier-Respondents Holmes & Narver, Inc., and Wausau Insurance Companies*